IN THE

Supreme Court of the United States

OCTOBER TERM—~~1948~~ 1949

No. ~~437~~ 14

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

LOUIS F. McCABE,
1218 Chestnut Street,
Philadelphia, Pa.,

EARL DICKERSON,
3501 South Parkway,
Chicago, Illinois,

DAVID M. FREEDMAN,
100 Fifth Avenue,
New York 11, N. Y.,

HARRY SACHER,
342 Madison Avenue,
New York 17, N. Y.,

Attorneys for Petitioner.

SAMUEL ROSENWEIN,
122 East 42nd Street,
New York 17, N. Y.,
of Counsel.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Eugene Dennis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, District of Columbia Circuit, entered October 12, 1948 (R. 417), affirming a judgment of conviction of the petitioner in the District Court for the District of Columbia (R. 2).

Statement of the Matter Involved

Eugene Dennis, the petitioner herein, is the General Secretary of the Communist Party of the United States (R. 165). In or about the month of March, 1947, the House Committee on Un-American Activities announced through

the public press that it was scheduling hearings on the Rankin Bill (H. R. 1884) and the Sheppard Bill (H. R. 2122) (R. 378). The Chairman of the Committee, John Parnell Thomas, testified at the trial that these two bills generally related to "whether or not the Communist Party should be outlawed in the United States" (R. 174). The Committee in no way having indicated that it intended to afford an opportunity to the Communist Party to present its views on this legislation (R. 199), the petitioner here, on behalf of that Party, wired the Committee requesting an opportunity to be heard (R. 378). Petitioner was thereafter notified that his appearance before the Committee had been scheduled for March 26, 1947 (R. 379). The petitioner requested two hours' time "to adequately present the views and position of the Communist Party on H. R. 1884 and H. R. 2122" (R. 379), and that time was granted (R. 380).

The petitioner appeared before the Committee without counsel on March 26, 1947. He appeared, as has been indicated, voluntarily at his own request to testify concerning proposed legislation affecting a political party of which he was the general secretary. He had been assured that he would have full opportunity to present the views of the Communist Party with respect to the pending measures.

The petitioner was not the first witness called that day (R. 218). While he was sitting in the hearing room, and while another witness was testifying, the Chairman of the Committee quietly called the Committee's investigator to his side and directed him to prepare and be ready to serve a subpoena on the petitioner (R. 203, 216).

> "Q. In other words, a half hour, at least, before Mr. Dennis had been called as a witness, at his own request, you had made up your mind to subpoena him for April 9; is that correct? A. I had not made up my mind.
>
> Q. Who had made up his mind, had Mr. Thomas? A. The chairman of the committee.
>
> Q. Now, when did Mr. Thomas first make known to you that he had made up his mind, before Mr. Dennis

was called, that he would subpoena Mr. Dennis to appear on April 9? A. The chairman called me to his place at the committee hearing room I would say approximately 10:45.

Q. And that was during a session of the committee? A. That is right. Mr. Schmidt was testifying, and he directed me to have a subpoena prepared for Mr. Dennis and for me to serve that subpoena" (R. 235).

The petitioner, unaware of these prearranged plans between the Chairman of the Committee and the investigator, finally was called by the Committee and sworn (R. 167). It then appeared that although the petitioner had been "courteously" (R. 409) granted leave to appear before the Committee, the real purpose of the invitation was to entrap him personally, to stigmatize him and to compel disclosure from him of some alleged violations of law (R. 168). The protests of the petitioner were met by the service of the subpoena upon him, returnable April 9, and the immediate adjournment of the session of the Committee (R. 204).

Prior to the return day, the petitioner wrote to the Chairman of the Committee explaining the reasons why he could not appear (R. 396-407). In his communication, the petitioner pointed out that he had no intention "to ignore the authority of any lawful congressional body" (R. 396). He stated that he had consulted with and obtained the advice of counsel; that the Committee on Un-American Activities was not a lawfully constituted body and from its inception in operation and effect had acted oppressively and beyond the bounds of authority; that the language of the authorizing statute was vague and indefinite without standards and contained no limit on the Committee's power of inquiry; that the Committee since its inception had assumed the inquisitorial function of a grand jury without affording witnesses the procedural safeguards guaranteed by the Constitution; that the Committee since its inception had engaged in non-legislative and unlawful activities; and that the House Committee was unlawfully constituted in

that it did not consist solely of members of Congress, but that at least one person on the said Committee was not a duly qualified member of the House of Representatives.

On April 9, 1947, an attorney for the petitioner appeared before the Committee, asked leave to read the aforesaid communication, which was denied (R. 252), and then left the communication with the Committee (R. 252). Whereupon, the Chairman of the Committee revealed the purpose of the meeting:

> "Mr. Mundt: All right, Mr. Stripling, you may proceed with the case against Mr. Dennis in absentia" (Hearings, April 9, 1947, p. 3) (R. 256).

The petitioner's non-appearance was reported to the House of Representatives—but the written explanation for his non-appearance never was read to that body (R. 280). Citation for contempt followed, and on April 30, 1947, the indictment herein (R. 3-4) was returned charging the petitioner with willful default after lawful summons in violation of Section 192 of Title 2, United States Code.

On May 20, 1947, the petitioner moved to dismiss the indictment (R. 5-7). A motion to take testimony in aid of the motion to dismiss the indictment was made on the same day (R. 15-19). The petitioner offered to prove in support of his motion to dismiss the indictment that the Committee on Un-American Activities "was not and is not as a matter of fact" (R. 15) a duly constituted committee of the Congress of the United States; that in fact the purposes and activities of the Committee were unrelated to any proposed legislative action; that the aims and actions of the Committee were in fact illegal and void; that the Committee did not in fact consist exclusively of members of the House of Representatives, but included one John E. Rankin, who, under the provisions of Section 2 of the Fourteenth Amendment, was not authorized to act or to exercise any of the powers or prerogatives of a member of the House of Representatives. The motions were denied (R. 19-27).

On May 20, 1947, the petitioner moved for an inspection of the Grand Jury minutes (R. 7-11) and for dismissal of the indictment because of the suppression of evidence from the said Grand Jury which affirmatively established that petitioner did not willfully fail to appear before the Committee. The petitioner offered to prove that when the communication explaining the reasons for his non-appearance were left with the Committee on April 9, the following occurred:

> "Mr. Mundt: I think that probably the committee should consider this statement in executive session and then determine whether or not it is a valid reason for not answering the subpoena and govern its action accordingly" (R. 10).

Yet the Committee in reporting to the House the circumstances of the alleged contempt deliberately withheld from it the petitioner's explanation for his non-appearance. Moreover, the communication appears to have been also withheld from the Grand Jury while it was deliberating as to whether the petitioner had willfully failed to appear before the Committee. The motion to inspect the Grand Jury minutes was denied (R. 26-27).

The petitioner seasonably moved for a transfer of the trial to another venue (R. 27-32, 41) and duly challenged all talesmen who were Government employees (R. 64). The petitioner pointed to the promulgation of Executive Order 9835, March 12, 1947 and to its provisions which called for the discharge from Government employment of any person concerning whom there is "reasonable grounds • • • for belief that • • • (he) • • • is disloyal to the Government of the United States", and that among the "activities or associations which may be considered in connection with the determination of this loyalty", was included "sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as • • • Communist" (R. 28). The petitioner maintained

that Government employees could not lawfully serve as jurors (nearly all of the trial jury were Government employees) in the trial of an indictment initiated by the Committee on Un-American Activities and prosecuted by the Government against the General Secretary of the Communist Party. The petitioner pointed out that the meaning of "sympathetic association" was undefined in the Executive Order and there was no assurance that it would not be construed by the Attorney General to include a recognition by a juror of the rights of a member of the Communist Party (R. 29). Members of the Committee on Un-American Activities had stated openly on the floor of the House of Representatives that they demanded prosecution, conviction and maximum punishment of this petitioner (R. 29). They charged that anything less would open the persons responsible to charges of disloyalty and sympathy to Communism (R. 29). Despite the illegality of the Executive Order, no Government employee could be expected as a matter of law to withstand this imminent threat to his reputation and livelihood if he acquitted the petitioner. Moreover, the petitioner demonstrated that a state of near-hysteria had been engendered by the Committee on Un-American Activities against the petitioner before the trial, and that the oppressive political atmosphere affecting all residents of the District of Columbia was the subject of widespread public comment (R. 29-32). The motions for transfer and the challenge to Government employees were denied (R. 41, 64).

Counsel for the petitioner was not permitted to make his opening statement to the jury (R. 110-111, 143-144, 149-150). He was not permitted to tell the jury that the petitioner had communicated to the Committee prior to April 9 the reasons for his non-appearance; he was not permitted to inform the jury that he would offer the communication into evidence; he was not permitted to inform the jury that he would prove during the course of the trial that the Committee on Un-American Activities was not in fact a legislative committee of Congress and

since its inception had been engaged in non-legislative and unlawful activities (R. 383-392); he was not permitted to inform the jury that he proposed to prove during the trial that the Committee had no proper purpose in attempting to subpoena the petitioner, that the petitioner did not willfully fail to appear in response to a lawful subpoena, and that the Committee in seeking to require the petitioner's attendance was carrying out a conspiracy of political persecution (R. 392-393); nor was counsel permitted to inform the jury that he proposed to prove that the Committee did not consist exclusively of members of the House, but included one John E. Rankin, who although purporting to act as a Representative from the State of Mississippi, was not authorized so to act (R. 393-395).

The Government's first witness was John Parnell Thomas, Chairman of the Committee, who testified on direct examination as to the events of March 26 (R. 162-181). He witnessed the service of the subpoena (R. 170).

Upon cross-examination (R. 191-217), petitioner's counsel was not permitted to question the witness concerning the Committee's interpretation of the terms "subversive" or "un-American" as contained in the authorizing resolution (R. 193-198); counsel was not permitted to question the witness concerning the Committee's non-legislative activities (R. 213-217); he was not permitted to inquire (R. 212-213) whether John E. Rankin had stated that the Committee was the "grand jury" of America (91 Cong. Rec. 275, 1941); indeed, counsel was not permitted to elicit from the witness any replies concerning the composition of the Committee, the Committee's interpretation of its statutory authority, or the nature of its activities (R. 182-217). The Committee had no "official pronouncement" before it (R. 198) as to what was "un-American" or "subversive" when it branded individuals or organizations as subversive or un-American (R. 198). The witness assumed "that every member of our committee now has a very good idea of what constitutes un-American activities: but I can only speak for myself" (R. 193), not for "Mr.

Wood, or Mr. Mundt, or Mr. Peterson, or any of the others" (R. 193). By these standards, the Committee's files of "subversive" persons involved "something like a million individuals or more than a thousand organizations" (R. 189), and the list was "increasing all the time" (R. 190).

The witness, Karl E. Mundt, a member of the Committee, testified on direct examination as to the events of April 9 (R. 249-250). The petitioner did not appear on that day (R. 250).

Upon cross-examination, he conceded that petitioner's eleven page written communication to the Committee explaining the reasons for his non-appearance was not read to the House except the first sentence stating that the petitioner would not appear (R. 256).

At the close of the Government's case, the petitioner moved to strike testimony and for a judgment of acquittal which was denied (R. 257-267).

Upon the opening of petitioner's case, counsel offered into evidence (R. 268-270), petitioner's communication to the Committee (R. 396-407) and the complete proffer of proof made in the opening statement at the commencement of the trial (R. 383-395), and throughout the cross-examination of the Government's witnesses, to all of which objections were sustained.

Counsel again attempted an opening statement to the jury, informing the Trial Court (R. 271) that he intended to tell the jury that counsel would prove through a witness all the matters contained in his proffer of proof (R. 383-395).

> "Mr. McCabe: May I repeat, then, your Honor, that I propose to open to the jury and read to them as matters which I intend to prove the paragraphs set forth in Defendant's Exhibit No. 3?
>
> The Court: Yes.
>
> Mr. McCabe: I understand your Honor prohibits me from doing that?
>
> The Court: That is right" (R. 272)

The petitioner called on his own behalf, the witness, Vito Marcantonio, a member of Congress for twelve years (R. 272). Objections to questions put by petitioner's counsel to the witness being sustained almost from the outset (R. 277), the following occurred:

> "Mr. McCabe: I propose to prove now by this witness who has been sworn the matters set forth in my proffer of proof which has been marked Defendant's Exhibit No. 3. I propose to ask him seriatim questions which will bring out answers in proof of each one of these items.
>
> Mr. Fihelly: We object to each and every one of those questions, as we have before, and having objected to the subject matter, which has been sustained by your Honor, we will object to the question being propounded of this witness or any witness.
>
> The Court: Objection sustained.
>
> Mr. McCabe: Your Honor grants me an exception?
>
> The Court: Yes. You have your record."

The following colloquy also took place:

> "Mr. McCabe: I propose to prove through this question that Mr. Rankin is not a Member of Congress, not a lawfully elected Member of Congress, and is not a member of any committee of Congress.
>
> Mr. Fihelly: It has nothing to do with the issues of this case.
>
> The Court: I sustain the objection. I think that is covered.
>
> Mr. Fihelly: That is Defense No. 1.
>
> Mr. Brodsky: I want to make sure we are getting a witness through whom we are making a proper proffer of proof. Your Honor has ruled on that?
>
> The Court: Very well."

The petitioner thereupon rested and renewed his motion for an acquittal, which was denied (R. 287).

All of petitioner's prayers for instructions (R. 363-369) except two (R. 336) were denied (R. 287-293).

The Court in its charge to the Jury (R. 331-339) left for their consideration virtually only two questions—was the petitioner served with a subpoena, and did he or did he not appear? The Court had excluded all evidence from the trial and from the jury concerning the petitioner's explanation for his non-appearance; excluded all the evidence which sought to establish that in operation and effect the Committee was an unlawful body; that the Committee was unlawfully constituted; that it had been engaged from its inception solely in non-legislative purposes wholly unlawful; and that the purpose of the hearing of April 9 with respect to the petitioner was likewise non-legislative and unlawful.

The jury returned a verdict of guilty (R. 342) after deliberating for six hours (R. 339, 342) and after receiving an additional charge of the Court which virtually compelled the verdict (R. 341-342).

Motions for a new trial (R. 369-371) and in arrest of judgment (R. 371) were duly made and denied. The petitioner was sentenced to imprisonment for a period of one year and a fine of one thousand dollars on July 8, 1947 (R. 362). Bail pending the determination of the appeal was fixed at $10,000 (R. 362). Notice of appeal (R. 2) was filed on July 8, 1947 (R. 3). On October 12, 1948, the Court of Appeals District of Columbia Circuit unanimously affirmed the judgment below.

Jurisdiction

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 417). By order dated October 30, 1948, Chief Justice Vinson extended the time for filing this petition for certiorari to and including November 29, 1948 (R. 419). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 United States Code, Section 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 United States Code, foll. Section 687).

Statutes and Resolution Involved

(a) Rev. Stats. Sec. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.
>
> • • • • • •

(b) Rev. Stats. Sec. 104, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 194:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.
>
> • • • • • •

(c) Sec. 121(q)(1), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman and may be served by any person designated by any such chairman or member.

* * * * *

(d) On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

Questions Presented

PART A

1. Whether under the Constitution and in accordance with basic principles of representative government, there is power in the Congress to enact the statute (Public Law 601) creating the House Committee on Un-American Activities.

2. Whether the statute creating a standing committee of the House known as the Committee on Un-American Activities, on its face and as construed and applied by the Committee, is unconstitutional and in contravention of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

3. Whether the power vested by the statute in the House Committee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied and construed by the Committee and the Court in this case, contravenes the provisions of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

4. Whether the petitioner was lawfully summoned by the Committee as a witness to the meeting of April 9 within the purview of Section 192 of Title 2, United States Code.

5. Whether the failure of the Committee to report to the House the petitioner's written explanation for his non-appearance contravened the provisions of Section 194 of Title 2, United States Code and the authorizing statute.

6. Whether the Court erred in denying petitioner's motion to inspect the Grand Jury minutes where it appeared

that the Grand Jury which returned the indictment charging the petitioner with willful default did not have before it petitioner's written explanation for his non-appearance.

7. Whether the Court erred in denying petitioner's motion for a transfer of the trial to another venue.

8. Whether, under the special circumstances of this case, where a contempt proceeding has been initiated by the Committee on Un-American Activities and prosecuted by the Government, and the defendant is a principal officer of the Communist Party, petitioner's challenge to all talesmen who were Government employees and subject to the terms and provisions of Executive Order 9835 should have been sustained.

9. Whether the Trial Court erred in refusing counsel for the petitioner the opportunity to establish by way of opening statement, cross-examination, direct examination, prayers for instruction and other appropriate methods the fact that petitioner had sent to the Committee prior to April 9 a written explanation for his non-appearance; the fact that the Committee was acting beyond its authority and not in aid of a legislative function; the fact that the Committee had no lawful purpose in attempting to subpoena the petitioner to the meeting of April 9; and the fact that the Committee did not consist exclusively of members of the House of Representatives.

10. Whether the exclusion of the aforesaid proof denied the petitioner the elements of a judicial trial and deprived him of rights guaranteed by the First, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution.

11. Whether the Court erred in charging the jury (R. 338) that "willful" as used in Section 192 of Title 2, United States Code, requires only that the petitioner act intentionally and deliberately, as contrasted with accidentally and inadvertently.

PART B

1. Whether the Court of Appeals and the Trial Court were correct in holding that Section 2 of the Fourteenth Amendment is not mandatory upon Congress; in holding that the effect of Section 2 is a "power conferred upon" Congress "of reducing the representation of a State" which Congress may or may not exercise at its discretion and pleasure; in holding that Congress alone is the judge of "its duty" to exercise the power conferred upon it by this section

(a) Whether, when a violation of the Constitution has continued for seven decades while no issue was brought before a Court in which an individual's right of due process in a criminal trial was prejudiced by the violation; and when the violation has been tolerated on the ground that, if a wrong, it was a wrong without a remedy in the courts because each House is the judge of the election returns and qualifications of its own members; and when the legislative branch of government takes a step further and initiates an action asking the judicial branch to intervene in order to imprison a person who disputes the authority of Congress to seat a larger number of representatives from a State than permitted under Section 2 of the Fourteenth Amendment—whether, then, the judiciary department of government may become a party to the violation of the said Section 2 of the Fourteenth Amendment by the positive action of imprisoning the person raising the issue.

(b) Whether, in such a case, where the violation has been left without a remedy in the courts on the ground that the remedy lies in Congress alone, while two generations of citizens have been deprived of the vote and men not responsible to the disfranchised millions are seated in Congress—whether a person

in jeopardy of his liberty through a charge of contempt of a committee partly composed of men so seated in Congress in violation of the section of the Fourteenth Amendment can be denied before Congress or before the Court trying him for his freedom, the opportunity to offer proof that the Committee is without authority;—or whether there exists no field of due process that may be claimed in court by a person against whom a congressional committee demands criminal penalty.

Reasons Relied On for Allowance of the Writ

I

The construction of the provisions of law creating the House Committee on Un-American Activities is an important question of federal law which has not been, but should be, settled by this Court. A statute has been enacted creating a permanent governmental body with unlimited power to compel disclosure of a person's opinions and beliefs. All persons are subject to this "continuous and pervasive restraint" on freedom of thought and expression. It is simply not valid to assert today that men may speak freely on every subject, even those subjects which "touch the heart" of things. *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). The fact is that the expression of ideas is permissible only if, in the opinion of officials of Government, such ideas are not "subversive" or "un-American". The statute here is a "thought control" measure, heretofore unknown to the Constitution and our democratic institutions, engendering fear, self-censorship, and conformity. Ideas of social, economic and political change have been vilified and stigmatized by officials of Government as "subversive" and "un-American". Even the idea of social and racial equality has been condemned (76th Cong., 1st Session, H. R. 2, Jan. 1939). Public citizens,

jurists, philosophers, religious leaders, scientists, artists, writers, trade union leaders, the Negro people, the foreign born, and countless other American men and women have felt the lash of this statute. Liberty of association is constantly threatened as labor unions, civic organizations, humanitarian groups, consumer organizations, political parties, nationality groups, religious societies and the multifold number of significant associations which exist in this country feel the oppressive burden of a heresy measure.

The Court of Appeals in its decision referred to the denial of certiorari by this Court in *Josephson* v. *United States*, 333 U. S. 838, rehearing den., 333 U. S. 858 and *Barsky* v. *United States*, 334 U. S. 843, petition for rehearing still pending, as settling "this question" of constitutionality (R. 409). We respectfully submit that a contrary view obtains both in law and in fact. "The denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, * * *". *Atlantic Coast L. R. Co.* v. *Powe*, 283 U. S. 401, 403 (1931). Moreover, the question will not down. There is a rising tide of feeling that the statute here cannot be squared with the Constitution. The belief is growing that there is a serious need for this Court to exercise its historic function of interpreting the fundamental document (See, for example, Commager, Henry Steele, *Who Is Loyal to America?* in Harpers Magazine, September, 1947; 47 Columbia Law Review 416-431 (April, 1947) *"Constitutional Limitations on the Un-American Activities Committee"*; 14 Univ. of Chicago Law Review 256 (Feb., 1947); 96 University of Pa. Law Review 381-401 (February, 1948) *"Restraints on American Communist Activities"*; 46 Michigan Law Review 521-532 (February, 1948) *"Investigatory Power of Congress—Validity of the Un-American Activities Committee Inquiries Into Professional and Political Affiliations"*; 61 Harvard Law Review 592 (April, 1948) John Lord O'Brian, *"Loyalty Tests and Guilt by Association"*; 7 Lawyers Guild Review 57-68 (March-April, 1947) *"The Constitutional Right to Advo-*

cate Political, Social and Economic Change—An Essential of American Democracy"; The New Yorker (November 13, 1948, pp. 134 et seq.) "*The Whole Story*"; also, the widespread comments of the public press and radio). The issues are too grave for this Court to withhold judgment. What is the place of governmental power in our constitutional system? Is there any power in Government under the Constitution and in the light of our historic traditions to restrict in any manner the free advocacy of ideas? Can a representative government, existing by consent of the governed, long endure when any body of ideas, or persons espousing such ideas, are suppressed? It is submitted that these are issues of substance and general importance, involving as they do, the construction and application of a measure which affects basic liberties.

The consequences which flow from a failure to resolve these issues are becoming more evident daily in life itself. Without restraint, officials of Government have issued an "Executive Order" conditioning public employment on the basis of opinion and belief. Pursuant to such Order, an Attorney General issues from time to time a "subversive list" proscribing associations of Americans for the ideas which they espouse. Secret "loyalty" investigations without the slightest semblance of due process are conducted daily, with men and women losing their livelihoods and reputation, and never being afforded the opportunity to confront their accusers. A mere suspicion of nonconformity places persons in peril. Widespread deportation proceedings have been begun against the foreign born, many of whom have lived here most of their mature lives, solely because of their beliefs and associations. Men have been confined to Ellis Island without bail and required to forego food in order to quicken the conscience of officials of Government. "Loyalty" tests and little "Thomas" committees abound on state and local levels. In Ohio, Colorado and California grand juries, convened at the behest of officials in Washington, inquire into citizens' private beliefs, and

associations, seek to compel them to testify against themselves and, with the aid of the judicial process, incarcerate these men and women for indefinite terms without bail. In the legislative halls, officials of Government seriously consider a Mundt-Nixon bill (H. R. 5852) which virtually extinguishes every element of freedom contained in the Bill of Rights, a proposed measure clearly patterned after the Hitler Decrees of 1933-1941 (Compare the Mundt-Nixon provisions and the Nazi decrees in Reichsgesetzblatt, July 26, 1933, May 26, 1933, July 14, 1933, April 7, 1933, December 4, 1941). Finally, an entire political party, the Communist Party, finds itself faced with the threat by Government of complete suppression charged with no offense other than its mere existence (See the indictments in *United States* v. *Foster, et al.*, Southern District of New York, C-128-87; C-128-88 to 99). These are only some of the fruits of a statute which for ten years has slowly eroded the foundations of constitutional government. It is submitted that it is time for this Court to call a halt.

On November 18, 1948, this Court granted certiorari in *Eisler* v. *United States of America*. The constitutional and legal issues in that case are in many respects similar to the ones involved on this application. This Court will have before it in the *Eisler* case consideration of the validity of the authorizing statute creating the Committee on Un-American Activities. The true administration of justice requires that the petitioner here, along with all other persons similarly affected, be afforded the opportunity to present fully and discuss the basic constitutional issues and the reasons why his judgment of conviction should not stand.

II

The Court of Appeals held that the petitioner had been lawfully summoned to the meeting of the Committee on April 9. The decision in *Wilder* v. *Welsh*, 1 MacArthur 566 (Sup. Ct. D. C., 1874), which the Court below attempted

to distinguish, supports the petitioner's contention. Indeed, the Court below conceded that the privilege of a witness before Congress or any of its committees, stands on the same footing as the privilege of the members of that body so far as freedom from arrest is concerned. But the privilege from arrest, "privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; * * *" *Jefferson's Manual and Rules of the House of Representatives* (Gov't Pr. Office, 1943). Sound reasons exist for protecting a witness from compulsory process while voluntarily testifying before a congressional committee. The legislator is free from arrest and compulsory process so that he may fully perform the functions of his office. The citizen who appears before the legislators to express his views on pending legislation, as is his right, should be assured of an equal freedom. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

III

The ruling by the Court of Appeals that the failure of the Committee to disclose to the House the written explanation for petitioner's non-appearance was "immaterial" (R. 411) appears contrary to the provisions of Section 194 of Title 2, United States Code, and the terms of the authorizing statute creating the Committee. The House cited the petitioner for contempt upon the representation of the Committee that petitioner had willfully defaulted in appearance. The House conducted its deliberations so far as the record here reveals without knowledge that the petitioner had explained in writing prior to the return day the reasons for his non-appearance. Whether the suppression of the document was lawful is a question which should be decided by this Court, affecting as it does the rights of witnesses before legislative committees.

Similar reasons exist for this Court's consideration of the ruling by the Court below on petitioner's motion to inspect the Grand Jury's minutes. The indictment here (R. 4) charges the petitioner with willful default. "The rudimentary demands of justice" (*Mooney* v. *Holohan*, 294 U. S. 103, 112, 1935) required that petitioner's explanation for his non-appearance be presented to the Grand Jury for their consideration. The determination of the weight to be given to petitioner's reasons for non-attendance was a matter for the Grand Jury to decide, not a matter for the prosecuting officials to withhold.

IV

The Court of Appeals has decided a federal question probably in conflict with applicable decisions of this Court. Failure to grant petitioner's motion for a transfer of the trial and to sustain his challenge to all talesmen who were Government employees constituted serious error. So long as the validity of Executive Order 9835 remains untested, it is clear that it operates as a mandate to every Government employee to avoid any "sympathetic association" with a Communist. The words are undefined. To a layman, especially a Government employee, the terms of the Order, "sympathetic association", might well include the acquittal of the General Secretary of the Communist Party charged with contempt of the House Committee on Un-American Activities. To be stamped as "disloyal" under the Order means to every Government employee loss of livelihood and reputation. It should be observed that the Chairman of the Committee testified before the jury that he had a "subversive list" of a million individuals (R. 189); that it was "increasing all the time" (R. 189); and that the Committee had a rule permitting "agents of the Government to come and see our files" (R. 188). The fact that cessation of employment would not actually follow a verdict against the Government, or

the fact that a juror swore he would not be influenced in his decision were not sufficient grounds for overruling the petitioner's challenge. It was enough that it might possibly be the case. *Crawford* v. *United States,* 212 U. S. 183 (1909). The decision of this Court in *United States* v. *Wood,* 299 U. S. 123 (1936) is not to the contrary. This is clearly the "special and exceptional case" (supra, p. 150) to which this Court referred. The Court below relied on its own decisions in *Higgins* v. *U. S.,* 160 F. 2d 222 (1946) and *Frazier* v. *U. S.,* 163 F. 2d 817 (1947). In the latter case, this Court granted certiorari April 19, 1948, 333 U. S. 873. It is submitted that the decision of the Court below on this issue deprived the petitioner of a fair and impartial trial in violation of the provisions of the Sixth Amendment to the Constitution.

V

The petitioner was not permitted to prove at the trial that his default was not willful. He was not permitted to prove that the Committee was not engaged in aid of any legislative function. He was not permitted to prove that the Committee's composition was illegal. He was not even permitted to prove that the Committee was engaged in a non-legislative purpose at its meeting of April 9. The Court below appears to be of the view that once the constitutionality of a Congressional committee is established, its conduct and activities with respect to witnesses summoned to appear before it are no longer subject to judicial review (R. 409). The issues thus raised by the Court's decision are the same as those pending before this Court in *Eisler* v. *United States.* The Trial Court and the Court below by affirming, appear to have overruled the long-established doctrine of this Court that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress's limited powers. *Kilbourn* v. *Thompson,* 103 U. S. 168; *In re Chapman,* 166 U. S. 61;

McGrain v. *Daugherty*, 273 U. S. 135; *Jurney* v. *McCracken*, 294 U. S. 125. By its exclusion of petitioner's testimony and the refusal of his prayers for instructions, the Trial Court appears to have construed the contempt statute (Section 192 of Title 2, United States Code) as an action to enforce a subpoena contrary to the legislative intent and the applicable decisions of this Court. *Sinclair* v. *United States*, 279 U. S. 263.

VI

There is also involved here, as in *Eisler* v. *United States*, the question of the definition of the word "willful" as used in Section 192 of Title 2, United States Code. The Trial Court excluded all evidence relative to the petitioner's good faith and lack of bad purpose. The same issue is involved in many of the pending contempt cases and should be settled by this Court. The decision of the Court below appears to be in conflict with the decisions of this Court. *United States* v. *Murdock*, 290 U. S. 289; *Hartzell* v. *United States*, 322 U. S. 680; *Screws* v. *United States*, 325 U. S. 91.

VII

The Court of Appeals has decided, it is respectfully submitted, a federal question in a way probably in conflict with applicable decisions of this Court. The petitioner contended below that the Committee on Un-American Activities was not in fact a committee of the House of Representatives in that it did not consist exclusively of members of that House, but included one John E. Rankin, who, under the provisions of Section 2 of the Fourteenth Amendment and the laws enacted pursuant thereto, was not authorized to act or to exercise any of the powers of a member of the House of Representatives. The Court of Appeals described this assertion as "fantastic" (R. 414) and

"sheer nonsense" (R. 415). It held that the question is clearly political rather than judicial citing *Saunders* v. *Wilkins*, 152 F. 2d 235 (C. C. A. 4th, 1945) cert. den. 328 U. S. 870.

The Court below appears to have overlooked the following considerations: (1) the petitioner was prepared to prove, but was not permitted to prove, the extent of the abridgment of the right of the Negro people to vote in the State of Mississippi; (2) the provisions of Section 2 of the Fourteenth Amendment specifically provide that "when the right to vote at any election * * * is denied * * * or in any way abridged * * * the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State"; (3) the petitioner was prepared to prove, but was not permitted to prove, the status of Mississippi's Representatives, including John E. Rankin, in the light of the provisions of the Fourteenth Amendment; (4) the Court below was not required to enjoin the operation of a Congressional function. All that the petitioner asserted was that the Congress could not invoke the judicial process to deprive a person of his liberty unless it first abided by its constitutional obligation; (5) the question raised by the petitioner was not "political". It was the appropriate subject of judicial cognizance. *Marbury* v. *Madison*, 1 Cranch. (U. S.) 137 (1803); *McPherson* v. *Blacker*, 146 U. S. 39 (1892); *Wood* v. *Broom*, 287 U. S. 1 (1932); *Smiley* v. *Holm*, 285 U. S. 355 (1931); *Koenig* v. *Flynn*, 285 U. S. 375 (1931); *Carrol* v. *Becker*, 285 U. S. 380 (1931). *Saunders* v. *Wilkins*, supra, is not to the contrary.

The provisions of the second section of the Fourteenth Amendment were considered by its framers and by the people who adopted it to be of the most vital importance for securing fundamental freedom. The conditions which gave rise to the enactment of this fundamental section have not disappeared. Discriminatory laws against the Negro people still exist; lynch terror is still prevalent;

incitements by public officials and others to violence against any member of the Negro community who presumes to exercise his constitutional right to vote still continues. There appears to be no reason for judicial participation in the nullification of such a constitutional provision when the issue is presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

November, 1948.

EUGENE DENNIS,
Petitioner.

LOUIS F. McCABE,
1218 Chestnut Street,
Philadelphia, Pa.,

EARL DICKERSON,
3501 South Parkway,
Chicago, Illinois,

DAVID M. FREEDMAN,
100 Fifth Avenue,
New York 11, N. Y.,

HARRY SACHER,
342 Madison Avenue,
New York, N. Y.,

Attorneys for Petitioner.

SAMUEL ROSENWEIN,
122 East 42nd Street,
New York, N. Y.
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. .....

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 19-27) and the opinion of the Court of Appeals (R. 408-416) are unreported.

Jurisdiction

The basis for this Court's jurisdiction is set forth in the petition.

Specification of Errors

1. The Court of Appeals erred in holding that the statute creating the Committee on Un-American Activities on its face, and as applied and construed, did not deprive petitioner of rights secured to him by the provisions of the

First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution, as well as Article I, Section 9 of the Constitution.

2. The Court of Appeals erred in holding that the petitioner had been lawfully summoned to the inquiry within the purview of Section 192 of Title 2, United States Code.

3. The Court of Appeals erred in holding that the petitioner's explanation for his non-appearance was properly withheld from the consideration of the House of Representatives and the Grand Jury.

4. The Court of Appeals erred in upholding the Trial Court's ruling denying petitioner's motion for a transfer of the trial and his challenge to all talesmen who were Government employees.

5. The Court of appeals erred in upholding the Trial Court's ruling excluding all evidence offered by the petitioner to establish that his default was not willful; that the Committee was not exercising a legislative function in general and with respect to the petitioner, and that the composition of the Committee was unlawful.

6. The Court of Appeals erred in upholding the charge of the Trial Court that the word "willful" as used in Section 192 of Title 2, United States Code, requires only that petitioner act intentionally and deliberately, as contrasted with accidentally and inadvertently.

7. The Court of Appeals erred in holding that the question as to whether the Committee is in fact composed entirely of members of the House of Representatives is not a subject for judicial consideration.

Summary of Argument

The House Committee on Un-American Activities is empowered under Public Law 601 and H. R. 5 solely to investigate into the propagation of ideas. The House of Representatives is without power to authorize such investigation because there is no power in Government under our Constitution to inquire into the personal beliefs of citizens. Our entire history, political and legal, establishes that freedom of thought and expression is unlimited and cannot be subjected to governmental inquisition. It is well established that where a committee of Congress does not have the jurisdiction or power under the Constitution to inquire, the Courts will intervene affirmatively or refuse its processes to impose criminal sanctions. No ascertainable standard of guilt exists in the Resolution and Section 192 of Title 2, United States Code, when read together. Conviction under such circumstances violates the provisions of the Fifth and Sixth Amendments to the Constitution. The record here establishes also that the Committee has no standards for its own guidance. The Resolution authorizes a sweeping inquisition, unconfined and vagrant, into the personal beliefs and affairs of citizens. The Committee has never had a legislative purpose from its inception and it was error to refuse the petitioner the opportunity to establish its non-legislative purpose. The petitioner did not "willfully make default" within the purview of the statute. Petitioner here offered to prove justification to offset the charge of willfulness. Where an alleged contempt of a Committee arises out of an undefined limitless inquiry into areas protected by the First Amendment to the Constitution of the United States, it is error to refuse the opportunity to defendant to present to the jury his explanation for his non-appearance based as it was upon advice of counsel and upon substantial constitutional grounds. Under these circumstances, he was entitled to a charge by the Court that "willfulness" means

with an evil or bad purpose. Recent decisions of this Court support this view. Lawful legislative inquiries are not frustrated by the adoption of the salutary rule that in cases involving free speech, a specific evil intent must be established. In this proceeding, there has been a complete failure of due process. The petitioner was not lawfully summoned to the inquiry because he was served with the subpoena at a time when he was in attendance before the Committee. Witnesses before a congressional committee enjoy the same privileges from arrest and the service of subpoenas as do the members of the committee before whom they appear. Despite the requirements of the Resolution and Section 194 of Title 2, United States Code, petitioner's communication to the Committee was never reported to the House of Representatives which voted to cite him for contempt. Suppression of this communication vitiated the proceedings. It was error to deny petitioner's motion for a transfer of the cause and his challenge to the jury upon the ground that they were Government employees. The promulgation of Executive Order 9835, unlawful as it is, subjects Government employees to dismissal even for "sympathetic association" with a member of the Communist Party. No juror who was a Government employee could be expected to resist the pressure of such unlawful Order and the admitted existence by the Chairman of the Committee of a blacklist of one million citizens whom the Committee considers "subversive". The petitioner was therefore deprived of a trial by a fair and impartial jury as he was entitled under the Sixth Amendment to the Constitution. The Committee on Un-American Activities does not consist exclusively of members of the House of Representatives. One of the members of the Committee was not under Section 2 of the Fourteenth Amendment to the Constitution authorized to act or to exercise any of the prerogatives of a member of the House. This Court is empowered to pass upon the issues involved.

ARGUMENT

I

The provisions of the Legislative Reorganization Act of 1946 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities are unconstitutional.

The Constitution of the United States was adopted in order to establish a form of government in which official power would cease to be arbitrary and excessive by being strictly limited in scope. The Government of the United States is one of enumerated powers, the limitations on its authority marked out in the Constitution. Discussing "the essential difference between the British government and the American constitutions", James Madison stated in his *Report on the Virginia Resolutions* (*Elliot's Debates*, Phil. 1836, 2nd Ed., Vol. IV, p. 569):

> "In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to law".

The power of government to compel disclosures of belief, opinion and association, and to place diverse burdens upon their exercise is nowhere expressly granted in the Constitution. If it be not expressed, is such a power properly an incident to an express power, and necessary to its execution? All our history and traditions, all of our legal precedents answer in the negative. The most dangerous concept affecting constitutional government is the notion that the legislature possesses unlimited means to carry into

execution its limited powers. Thus, the argument that belief and opinion may be abridged out of sheer "necessity" and in order "to preserve the government" has been uniformly condemned. In *Ex Parte Milligan*, 4 Wall. (U. S.) 2 (1866), the Supreme Court stated:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; * * *".

If it is "necessary and proper" for government to classify speech and investigate associations in order to "provide for the common defence" or "to regulate commerce" or "to guarantee the states a Republican form of government", then it follows that the government established by the founding fathers is not one of particular and definite powers only, but one which is vested with general, unlimited powers to legislate on all subjects including the press, religion and every form of belief or opinion. As Madison put it: "And it must be wholly immateria. whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers" (*Elliot's Debates, supra*, p. 568).

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances". (Emphasis added.)

The main tradition of American history, of our way of life, is freedom of speech, and of the press, of religion, of teaching, of proposal of change, of independent intellectual self-assertion. Cheney, E. P., *Freedom and Restraint: A Short History* in Annals of the American Academy of Political and Social Science (1938), Vol. 200, p. 4. And this is a tradition which we have prized throughout our history. It is indeed true that there have been many intrusions upon this liberty by the law, by the courts, by use of economic power, by public opinion—sometimes by mob violence. "But the claims of freedom have even more constantly asserted themselves". Cheney, E. P., *supra*, p. 4.

The practice of propagandizing by speech, by press, cinema, radio, books, in the meeting hall, the outdoor assembly, the platform and in the multifold other forms which propaganda activities assume is a liberty protected by our fundamental law. "This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy" (Jackson, J. in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945)).

Our appeal here is to this Court for the protection of this fundamental freedom. "No higher duty; no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion". *Chambers* v. *Florida*, 309 U. S. 227, 241 (1940). We appeal to this Court to protect the American people from destruction of the constitutional system. Inquiry into speech is in itself an abridgment of speech. Compare, *United States* v. *Ballard*, 322 U. S. 78 (1944). Classification of ideas into

"American" and "un-American" ideas; into "foreign" and "domestic" ideas is an abridgment of speech.

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us".
>
> Jackson, J. in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945).

If the resolution creating the House Committee on Un-American Activities is upheld, and citizens subjected to criminal sanctions pursuant thereto, the protection of the First Amendment and the liberties guaranteed thereunder will be lost.

In *Palko* v. *Connecticut*, 302 U. S. 319 (1937) Mr. Justice Cardozo wrote concerning freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal" (p. 327).

It is submitted, in the light of the foregoing, that Congress is without constitutional authority to enact legislation affecting the propagation of ideas, ideas with which we agree as well as those with which we disagree; that the provisions of the Act creating the Committee on Un-American Activities purport solely to authorize the Committee to inquire into the diffusion of ideas by citizens or groups of citizens; that Congress was without lawful authority to establish such inquiry; that the House Committee on Un-American Activities is therefore an unconstitutional and unlawful body without authority to summon any citizen before it; that no individual is required to appear before such body or make any answer to any inquiry except as he may voluntarily choose to do so.

II

The statute and resolution when read together provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution.

Section 192 of Title 2, United States Code, requires every person summoned to give testimony before a committee of either House of Congress to answer any question "pertinent to the question under inquiry". The statute is a penal statute; the offenses punishable by fine or imprisonment. Clearly this statute, by its very nature, requires in each case that it be read as if it contained the language of the resolution creating the particular committee involved. This is the only conclusion which flows from the decisions in *Kilbourn* v. *Thompson, supra,* and all the related cases which followed it. Compare, *Screws* v. *United States,* 325 U. S. 91, 95 (1945). And what is the "question under inquiry" when this criminal statute is so read? It is "the extent, character, and objects of un-American propaganda activities in the United States"; and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution".

Are the terms of this statute sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties? Can any citizen who is summoned to the Committee determine "the question under inquiry" or whether a question which will be put to him will be "pertinent" to the inquiry? How otherwise can he determine whether a refusal to answer would violate the law? The answers to these questions posed have great significance for it is clear that a statute which does not fix an ascertainable standard is repugnant to the due process clause in the Fifth Amendment to the

Constitution and to the Sixth Amendment where it is provided that an accused shall "be informed of the nature and cause of the accusation." The rule of "ascertainable standards" is applicable alike to civil and criminal cases. *Small Co.* v. *American Sugar Refining Company*, 267 U. S. 231, 239 (1925).

The resolution here "amounts merely to a dragnet which may enmesh anyone" who advocates social change, no matter how significant or insignificant that change may be. See, *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937). The words "subversive" or "un-American" do not have any technical or other special meaning; no well-settled common law meaning.

III

The Trial Court erred in rejecting evidence showing the inquiry to be without legislative purpose from its inception.

The investigation here has avowedly not been in aid of legislation since the inception of the Committee. The petitioner offered to establish this fact prior to the proceedings and at every appropriate point during the trial. He moved before trial for an order by the Court to take testimony in aid of the motion to dismiss the indictment pursuant to the Rules upon the basic ground that the Committee was not engaged in any legislative inquiry (R. 15 et seq.). Counsel for the petitioner in his opening statement (R. 110) indicated that he would offer to the jury proof of non-legislative purpose. The Trial Court refused to permit counsel to make such opening statement (R. 149). All efforts to elicit such information by cross-examination of the chairman of the Committee were denied (R. 195, 198, 212, 215). The offer to prove the non-legislative purpose was again made at the close of the Government's case (R.

268). When petitioner's counsel opened to the jury at the commencement of his own case, he was again prevented from referring to the purposes of the Committee (R. 270). Finally, petitioner called Hon. Vito Marcantonio, a member of the House of Representatives for almost twelve years (R. 272). His qualifications to discuss the activities of the Committee were not disputed (R. 273). The petitioner offered to prove through this qualified witness the non-legislative purposes of the Committee (R. 277; Deft.'s Ex. 3, R. 383). The Court declined to permit the evidence to be introduced with the statement to petitioner's counsel: "You have your record" (R. 277). The matter was raised again in the requests to charge (R. 363).

Proof that a legislative investigation is not in aid of legislation is clearly admissible since it involves the power and jurisdiction of the Committee to act, or to seek the judicial processes of Courts for the punishment of those who allegedly disobey the Committee's summons. *Sinclair* v. *United States*, 279 U. S. 263, 295 (1929); *Townsend* v. *United States*, 95 F. (2d) 352, 359-361 (Ct. of App., D. C., 1938), cert. den. 303 U. S. 664 (1938).

IV

The petitioner did not "wilfully make default" within the purview of Section 192 of Title 2, United States Code.

Section 192 of Title 2, United States Code, is derived in major part from the Act of January 24, 1857 (11 Stat. 155). At the time of the passage of the Act, the use of the word "willful" in a penal statute had a well-defined meaning. See *Potter* v. *United States*, 155 U. S. 438 (1894). It was then understood as signifying an evil intent without justifiable excuse. See the recital of authorities in *United States* v. *Murdock*, 290 U. S. 389, 394 (1933). The discussion by this Court in the *Murdock* case of the decision

in *Sinclair* v. *United States*, 279 U. S. 263 (1926), points to the view that "wilfulness" in the context of Section 192 of Title 2, United States Code, still retains the same meaning it was intended to have when it was included in the original statute.

The "matter under inquiry" here involved an investigation into "subversive" and "un-American" propaganda. The petitioner challenged the lawfulness of such an inquiry. He justified his non-appearance before the Committee by asserting rights guaranteed to him by the Constitution. He maintained that the Committee was without constitutional base in law and fact, a view held by many segments of the population.

In the context of these facts, it is submitted that the construction of the word "willful" in the statute requires a holding that it means an act done with a bad purpose. The issue was not whether the petitioner's views were correct; the issue was simply whether the jury was entitled to hear his explanation before determining that he was guilty of a contempt of a Committee acting under a vague and undefined resolution empowering it to inquire broadly into propagation of ideas.

Two recent decisions by this Court would seem to provide the answer. In *Hartzell* v. *United States*, 322 U. S. 680 (1944), the word "willfully" as used in the Espionage Act of 1917 was held to mean with an evil purpose.

In *Screws* v. *United States*, 325 U. S. 91 (1945), a statute which made it a crime to "willfully" deprive anyone of rights secured to him by the Constitution was held to require a charge by the Court that "willfulness" included an evil purpose or bad motive to save the vague provisions of the statute from constitutional infirmity.

The petitioner does not take the view, contrary to the belief of the Court below, that the explanation for his non-appearance was a bar to the prosecution. His request was simply that the explanation be submitted to the jury under appropriate instructions by the Court. To establish such a rule of law in no way frustrates lawful legislative

inquiries. It merely grants protection to a defendant who asserts basic rights guaranteed to him by our fundamental law. *Spies* v. *United States*, 317 U. S. 492 (1943), for example, involved the non-payment of taxes. This Court required proof of a specific criminal intent. *Hartzell* v. *United States, supra*, involved obstruction to the enlistment of men in the armed forces. This Court defined "willful" as denoting an evil purpose. The same view was adopted in *Screws* v. *United States, supra*, where the conviction of state officials for slaying their prisoner was reversed. Serious as these matters were to the Government of the United States—the collection of taxes, the raising of armies, the lawless enforcement of the law—this Court nevertheless held that the crime was not established without proof of a specific intent. It is respectfully submitted that the administration of justice would best be served here, in an area involving freedom of thought and expression, by construing the word "willful" in Section 192 of Title 2 as meaning with an evil purpose or bad motive.

V

The petitioner was not "lawfully summoned" to the inquiry within the purview of Section 192 of Title 2, United States Code.

As we have heretofore pointed out, the petitioner was served with a subpoena while he was testifying before the House Committee on proposed legislation then before it for consideration, and before the proceedings had been closed. We respectfully submit that service of a subpoena upon a witness while he is in attendance upon a congressional committee is unlawful and violates his privilege to be free from the service of such process on such occasion.

In *Wilder* v. *Welsh*, 1 MacArthur 566 (Sup. Ct., D. C., 1874), a motion was made to set aside the service of a

summons upon the ground that the defendant in the suit, when the service was made upon him, was a witness from one of the States in attendance upon a congressional committee.

> "The Court unanimously held that the *privilege of a witness before Congress, or before any of its committees, stands on the same footing as the privilege of the members of that body*, and that this does not extend to freedom from the service of a simple summons, but only from arrest" (p. 566). (Emphasis added.)

This decision makes clear that a witness appearing before a congressional committee enjoys the same privileges as the members of the committee. This includes not only the privilege to be free from arrest, but also from service of subpoenas.

In Jefferson's Manual and Rules of the House of Representatives (Govt. Pr. Office, 1943), it is stated:

> "This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; as a subpoena ad respondendum, or testificandum, or a summons on a jury; * * *" (p. 111). (See also notes on p. 111 in Jefferson's Manual. The House has constantly maintained that its members are privileged from service of a subpoena.)

It is submitted, therefore, that the petitioner while testifying before the Committee was privileged from all service of subpoenas, and was not "lawfully summoned" to appear before it on April 9, 1947. Indeed, even the rudimentary requirements were ignored for the blank subpoena, filled in by a subordinate, served in the Committee room during the hearing, was not even accompanied by a tender of the required witness fees (Rule XXXVI, Rules of the House of Representatives).

VI

The petitioner's explanation for his non-attendance was suppressed by the Committee in violation of the resolution creating it and the requirements of Section 194 of Title 2, United States Code.

Failure to disclose to the House of Representatives the explanation offered by petitioner for his non-appearance violated the terms of the resolution and statute which together required the report of all pertinent facts to the House. The House was entitled to know all the facts before it made its decision to certify the contempt proceedings to the United States Attorney's office. Clearly, this Court will not speculate as to what the House may have done if it had all the facts before it. Suffice it to say that suppression of this explanation was "a deliberate deception" and "inconsistent with the rudimentary demands of justice". *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935).

VII

Failure of the District Court to grant petitioner's motion for a transfer of the cause and to sustain the challenge to jurors who were Government employees deprived the petitioner of a fair and impartial trial within the intendment of the Sixth Amendment to the Constitution.

The grounds for the motion to transfer are succinctly stated in the affidavit in support of the application. We recite them in part:

> "There is in force and effect at the present time, Executive Order 9835 issued by the President on March 12, 1947. Notwithstanding its unconstitutionality and illegality, the fact is that this Order provides for the discharge from Government employment of any per-

son concerning whom there is 'reasonable grounds * * * for belief that * * * (he) * * * is disloyal to the Government of the United States'. Among the 'activities or associations which may be considered in connection with the determination of this loyalty', the Executive Order includes 'sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as * * * Communist'.

"The defendant, Eugene Dennis, is the general secretary of the Communist Party of the United States. The fact that he is a Communist leader has been widely publicized and is well known to every person who reads the newspapers or listens to the radio in the District of Columbia. Moreover, the indictment states that the reason that the defendant was subpoenaed to appear before the Committee was so that he might be questioned about the activities of the Communist Party of the United States.

"The enormous consequences of the Executive Order referred to above make it absolutely impossible to secure a fair and impartial trial in the District of Columbia for a leader of the Communist Party, particularly when the charge against him is laid by the Committee on Un-American Activities. The finding of disloyalty involves not only discharge from employment but a permanent branding as a disloyal and undesirable person, endangering the possibility of earning a livelihood in the future. No individual can be expected lightly to take the risk of incurring such consequences to himself, his family and his associates. The meaning of 'sympathetic association' is undefined in the Executive Order and there is no assurance that it may not be construed by the Attorney General to include a recognition of the rights of a member of the Communist Party. And even if the Attorney General himself would not so construe it, it is impossible to assume that persons selected for jury duty will run the risk of a charge of sympathy with Communism flowing from voting for an acquittal of so prominent a leader of the Communist Party."

The passion and hysteria which existed in the Capital had been the subject of critical press comment (R. 31).

To a large extent this attack upon progressive ideas, and the men and women who espoused such ideas, had been made by the Committee itself. Citizens had been vilified by that Committee as "disloyal" and "subversive" without any opportunity to defend themselves or obtain the rudimentary elements of justice to which they are entitled. Employees of the Government had been discharged without the opportunity to face their accusers or know the nature of the charges against them. Cries of "disloyal", and "subversive" poured forth from the halls of Congress, from the Executive Department, from the Thomas-Rankin Committee, accompanied by esponiage upon citizens, wire tapping, terrorization, and every form of political intimidation (R. 31 et seq.).

In *Crawford* v. *United States*, 212 U. S. 183 (1909), a Government employee was held disqualified to sit as a juror. This Court stated (p. 197):

> "It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

While *United States* v. *Wood*, 299 U. S. 123 (1936), upheld the right of Government employees to sit as jurors, where no reason was shown to forbid them from sitting, it is significant that this Court referred to the "special and exceptional case" (p. 150) where an employee might be apprehensive of the termination of his employment in case he decided in favor of the accused in a criminal case.

It is submitted that such a special and exceptional case does exist here and the rule of the *Crawford* case should apply. The Executive Order is specifically directed to

Government employees. Under the terms of this unlawful Order, and the announcement of a blacklist of over a million names, no Government employee in this case could be held to be as a matter of law an unbiased juror. The petitioner was therefore deprived of a fair trial by an impartial jury.

VIII

The Committee on Un-American Activities was not in fact a committee of the House of Representatives in that it did not consist exclusively of members of that House, but included one John E. Rankin, who, although purporting to act as a Representative from the State of Mississippi, was not, under Section 2 of the Fourteenth Amendment to the Constitution of the United States and the laws enacted pursuant thereto, authorized so to act or to exercise any of the powers or prerogatives of a member of the House of Representatives.

The gravamen of the offense charged by the indictment is an alleged willful failure on the part of the petitioner to obey a summons of a Committee of the House of Representatives. An essential part of the offense charged then is the existence of a duly constituted Committee of the House of Representatives whose summons petitioner allegedly failed to obey; one which fulfills at least the primary prerequisite for the constitution of such a Committee and consists exclusively of members of Congress.

Petitioner was under no obligation to appear before a group composed of a mixture of members and non-members of Congress. It is unthinkable that such a conglomeration of individuals could possess the enormous authority of a Congressional Committee. For it is axiomatic that the powers granted to Congress under the Constitution can be exercised only by members of Congress, chosen in accordance with the provisions of that document (United States Constitution, Art. 1, Sec. 2). And the entire theory behind the creation of Congressional Committees is that certain

functions of each House may properly be devolved upon "a Committee of its members" who act in behalf of and are bound by the limitations of the chamber to which they belong (*Barry* v. *U. S. ex rel. Cunningham*, 279 U. S. 597, 613, 73 Law Ed. 867 (1929)).

Nevertheless, the District Court refused even to inquire into the merits of petitioner's allegation that this so-called Committee did not in fact consist of members of Congress. Petitioner based his allegation on the provisions of the Constitution of the United States governing the structure and composition of the House of Representatives. By appropriate motions and offers of proof made before, during and after trial, he sought to demonstrate that the Committee did not, in fact, consist exclusively of members of the House as that term is defined in the Constitution.

The Court below did not contest the conclusion advanced by the petitioner. It simply declined to consider it at all. In so doing, the Court committed grave and palpable error.

Discussion throughout the nation and in the Halls of Congress after the Civil War centered about the proposals for amending the Constitution to change the basis for apportionment. It was that problem which received the primary attention of the Joint Committee on Reconstruction, popularly known as the Committee of Fifteen, and formed the subject of their first report. Following that report, the Congressional debate revolved around two essential positions. On the one hand, it was urged that Representatives should be apportioned on the basis of the number of voters in each State. On the other, many argued for an Amendment which would eliminate from the total population all persons of any race or color when the right to vote of any individual of that race or color was denied or abridged within any State.

The purpose of these proposals was two-fold: firstly, to relate the political power of any State to the degree to which political liberty was extended to its inhabitants, and secondly, to encourage the extension of the franchise to the Negro people in the South. These objectives were

constantly reiterated during the course of the debates in Congress (Congressional Globe, 1866, p. 379).

The debate was resolved by the adoption of the Fourteenth Amendment, the second section of which provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This section stands today as the only guide to the constitutional composition of the House of Representatives. It is the only lodestone in our basic law for determining whether individuals from any state are entitled to sit in the House of Representatives.

It is against that guide, that lodestone, that the right of persons purporting to exercise the authority of members of Congress must first be tested, for no one can even reach the stage of qualifying as a member of the House unless a seat is provided for him under this section. It is in the light of that guide that we must examine the status of John E. Rankin who, presuming to act as a Representative in Congress from the State of Mississippi, was a member of the so-called Committee which issued the summons to the petitioner in this case.

Congress has purported to grant to the State of Mississippi seven seats out of a total of 435 in the House of Representatives (World Almanac, 1947, p. 182). This allocation was based upon a consideration only of the total

population of that state undiminished to any extent by the proportion which the number of adult male citizens whose right to vote was denied or abridged bore to the total number of adult male citizens in that State.

Yet the irrefutable fact is that a wholesale abridgment of the right to vote has consistently occurred in Mississippi. At the time of the appointment of seven representatives to that state, as well as at the time of the election of John E. Rankin to the Eightieth Congress, the Negro people of Mississippi were uniformly denied the right to vote.

Of course, it is no longer open to question that the denial of the right to vote in primary elections in any state, such as Mississippi in which the primary is the determinant of the final election, falls within constitutional provisions pertaining to the right of suffrage (*U. S.* v. *Classic*, 313 U. S. 299 (1941); *Smith* v. *Allwright*, 321 U. S. 649 (1944)). And as the Report of the Senate Committee to Investigate Senatorial Campaign Expeditures in 1946, which inquired into the campaign, nomination and election of Theodore Bilbo, points out, the responsible officials of the State of Mississippi recognized the applicability of these decisions to the primaries in that state.

The lengths to which private individuals and public officials in that State went to maintain the exclusion of the Negro people from the right to vote were vividly portrayed in the evidence presented at the hearings held by that Committee as well as in the report itself. They indicate how state laws governing qualifications for voting were discriminatorily applied so as to eliminate Negroes from the exercise of voting rights, how officials have so applied literacy and educational requirements as to bring about disqualification of Negroes, how insurance against any effort on the part of the Negro people to exercise their right to vote was brought about by a campaign of terror and threats of violence on the part of prominent citizens of the State.

The abridgment of the right of the Negro people to vote has an important effect upon the number of representatives to which Mississippi is entitled under the Fourteenth Amendment. For the total number of white males in that State is 556,157. The total number of Negro males is 528,335. The number of aliens is negligible and there is no indication that there is any appreciable difference between the proportions of Negro and white males who are over the age of twenty-one years. It follows that for purposes of apportionment under the Fourteenth Amendment the figures as to total population of Mississippi should have been reduced by approximately forty-eight percent, the proportion of Negro males to the total male population of Mississippi. The number of seats in the House of Representatives to which Mississippi is entitled must, therefore, be reduced in a similar proportion. Mississippi was thus not entitled to more than four seats in that House (population figures taken from World Almanac, 1947, pp. 214-217, and reflect information secured by the census of 1940).

It is obviously impossible to say that each of the persons purportedly elected as representatives from the State of Mississippi occupies four-sevenths of a seat in the House; there is no authority for creating fractional parts of Congressional seats. Congress has not presumed to designate any of the four individuals authorized to represent the State of Mississippi in the House of Representatives. Indeed, under the Constitution no one except the qualified voters of the State of Mississippi is endowed with the authority to fill the authorized seats within that House (Constitution, Art. I, Sec. 2, Clause 1). Certainly this Court is nowhere expressly or by implication given that authority. Until the choice is made by the people of Mississippi none of the present would-be Congressmen is entitled to act in that capacity.

Thus John E. Rankin, one of the individuals purporting to act as a representative from the State of Mississippi, cannot be considered by this Court to be entitled so to

act under the terms of the Constitution. He cannot be regarded as a representative from the State of Mississippi and he cannot hold a seat in Congress otherwise than as a representative from that State. And since Mr. Rankin purported to serve as one of the members of the so-called House Committee on Un-American Activities, the Committee did not consist exclusively of duly elected members of the House and was not authorized to exercise the prerogatives of a Congressional Committee at the time petitioner was allegedly summoned to appear before it.

This Court has already construed this section of the Fourteenth Amendment (*McPherson* v. *Placker*, 146 U. S. 39, 36 Law Ed. 869 (1892)), and its power to do so has never been questioned. And this Court has given extensive consideration to problems relating to the apportionment of representatives among the several states and the manner of the selection of such representatives (*Wood* v. *Broom*, 287 U. S. 1 (1932); *Smiley* v. *Holm*, 285 U. S. 355 (1931); *Koenig* v. *Flynn*, 285 U. S. 375 (1931); *Carrol* v. *Becker*, 285 U. S. 380 (1931)). And here the propriety of judicial consideration of this problem is even more sharply evidenced since the fundamental liberty of a citizen depends upon it.

Nor is this case removed from the scope of judicial consideration by the prohibition against collateral attack upon the acts of a "de facto" officer. For there can be no "de facto" officer where there is no "de jure" office. It is well established that the acts of an individual who presumes to exercise the prerogatives of an office which does not constitutionally exist are wholly void and may be attacked at any time in any proceeding. As this Court declared in *Norton* v. *Selby County* (118 U. S. 425, 30 Law Ed. 178, 1885):

> "Where no office legally exists, the pretending officer is merely a usurper to whose acts no validity can be attached".

The gravamen of petitioner's contention in this case, as we have seen, is that there was no office which John E. Rankin could fill, since there was no constitutional authority for the creation of seven seats for representatives from the State of Mississippi. The issue petitioner presents is precisely the existence of the "de jure" office and that issue may be raised whenever it affects a defendant's rights.

In any event, the basis for the prohibition against collateral attack upon the acts of a "de facto" officer is wholly lacking in this case. That prohibition is designed to protect those who in good faith have placed reliance upon the validity of such acts and to avoid the uncertainty and confusion which would result from opening to question all of the acts of a "de facto" officer who has exercised the powers of an existing office for a considerable period of time. Such a policy consideration might conceivably be relevant if petitioner were contesting the validity of a law passed by Congress upon the ground that an improperly elected representative from the State of Mississippi participated in its enactment. But it can have no relevance whatsoever where all that is being considered is the power of an individual to participate in the issuance of an order directed solely to this petitioner compelling this petitioner to take certain specific action upon pain of criminal penalties. Here the propriety of the exercise of Congressional authority and the existence of the office in question are directly involved. At this point the petitioner is affected, not as a member of the public at large, but by virtue of an order directed to him.

For much the same reason this cannot be regarded as a "political" question of such a nature as to remove it from the scope of judicial consideration. Thus the case at bar has nothing in common with the situation presented in *Saunders* v. *Wilkins*, 152 Fed. 2nd, 235, cert. denied 328 U. S. 80, 90 L. Ed. 1940. There the Court refused to entertain an action brought against the Secretary of State of Virginia in which the plaintiff asked damages for the Secretary's refusal to certify him as a candidate for Repre-

sentative-at-Large. The basis upon which the action was brought was that the apportionment of Representatives to that State had not taken into account the requirement of the Second Section of the Fourteenth Amendment for a reduction of the number of Representatives where there had been an abridgment of the right to vote.

The issue thus presented was manifestly political. It revolved about the right of a particular individual to run for a certain office which had not been created by proper authority. The Court was asked to declare that an office of Representative-at-Large actually existed in the State of Virginia in spite of the fact that neither the Congress of the United States nor the State of Virginia had created it. The Court was requested to award damages to a private person for a purely political injury. The liberty of an individual was not at stake. The Court was not being asked to apply the provisions of the Constitution to protect a defendant from an unjust prosecution.

In the present case, however, the situation is precisely reversed. Here the Court is not asked to direct the Congress or the State of Mississippi to do anything. This Court is not asked to reduce the number of representatives from the State of Mississippi, to designate the manner in which representatives shall be selected, or to choose which representatives are the proper ones from that state. The decree of this Court will not even compel Congress to cease acting in violation of the Constitution or to refrain from seating more representatives from the State of Mississippi than that document permits. This Court is simply asked to decline to comply with a Committee's insistence that the petitioner be sent to prison upon the basis of his alleged refusal to heed the summons of that Committee, among whose members was a bald usurper of the mantle of a Congressman.

It is realized that the violation of the Fourteenth Amendment by the State of Mississippi and by other states in our Union has been countenanced for a long time. But "general acquiescence cannot justify departure from the law" (*Smiley* v. *Holm, supra*). To justify a refusal to apply the Fourteenth Amendment because for many years its violation has been tolerated is to write into our law a doctrine that constitutional limitations can be repealed by ignoring them. To refuse to apply the Second Section of the Fourteenth Amendment because Congress has chosen to forget about its existence is to destroy the fundamental idea that this is a government of laws and not of men.

Congress has chosen to ask this Court to put the petitioner in prison because he allegedly ignored the summons of a group of men purporting to act as a Committee of Congress. But this petitioner was never under a legal obligation to obey the orders of such a group of men unless they constituted in fact a committee composed of members of Congress. And it is the solemn duty of this Court to protect the liberty of the petitioner against invasion by a group which had no constitutional authority to summon him.

The Court is not asked to overrule Congress or to enjoin the operation of a congressional function. All this Court is asked to do is to state that if Congress does not abide by its constitutional obligations, it cannot involve the judicial branch of the government as a partner in its wrongdoing. It cannot secure a judicial blessing for the avoidance of its responsibilities.

CONCLUSION

The decision of the Court of Appeals involves important questions of federal law which have not been but should be settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised are ones of substance and general importance. Wherefore, the petitioner prays that a writ of certiorari issue to the Court of Appeals District of Columbia Circuit to review its judgment and decree.

Respectfully submitted,

LOUIS F. MCCABE,
EARL DICKERSON,
DAVID M. FREEDMAN,
HARRY SACHER,
Attorneys for Petitioner.

SAMUEL ROSENWEIN,
of Counsel.